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**IN THE  
COURT OF APPEALS OF INDIANA**

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JEFFREY A. R. STEPHENS,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 40A05-0612-CV-711
	)	
JESSICA STEPHENS,	)	
	)	
Appellee-Respondent.	)	

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APPEAL FROM THE JENNINGS CIRCUIT COURT  
The Honorable G. Thomas Gray, Special Judge  
Cause No. 40C01-9803-DR-057

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**May 29, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**VAIDIK, Judge**

## **Case Summary**

Jeffrey Stephens (“Jeffrey”) appeals the trial court’s denial of his petition for custody of his son, J.S. We find that Jeffrey did not carry his burden of establishing that there was a substantial change in circumstances that necessitated a modification of custody and that it was in the best interests of J.S. to modify the existing custody arrangement. Consequently, we affirm the trial court’s denial of Jeffrey’s petition for custody of J.S.

## **Facts and Procedural History**

In 1998, Jeffrey filed a petition for dissolution from his wife, Jessica Stephens (“Jessica”), and sought sole custody of their minor child, J.S. In April 2000, the trial court entered a dissolution decree and judgment apparently granting Jeffrey and Jessica joint custody.<sup>1</sup> In 2002, Jeffrey and Jessica filed competing petitions to modify custody. In its order, the trial court granted Jessica’s petition and awarded her sole custody of J.S. In support of its order, the trial court explained that:

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During the approximate three months that [Jeffrey] had exclusive possession and control of the child of the parties extreme, negative consequences resulted. The evidence indicates that the child was not cared for. Basic essential elements of nutrition, clothing and hygiene were neglected.

Once [J.S.] was restored to his mother he had regressed in personal development. He would not sleep alone, he would not bathe alone, and he would not even go to the bathroom alone. His initial reaction to his mother was loving which soon was replaced by anger. The statements reportedly made by [J.S.] to his mother lead one to conclude that the basic life

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<sup>1</sup> Jeffrey does not include the trial court’s dissolution decree and judgment in the record so we cannot say for certain that both Jeffrey and Jessica were granted joint custody upon dissolution of their marriage. Our basis for assuming that joint custody was granted stems from the fact that in 2002 Jeffrey and Jessica filed competing petitions to modify custody.

experiences [J.S.] had during those three months was an indoctrination of hatred for his mother.

Counseling was started with Melissa V. Newland, MS, NCC, LMHC, with reasonable dispatch following [J.S.'s] restoration to his mother. Ms. Newland's testimony indicated real and abiding concerns for [J.S.'s] well being and development assuming continued contact with [Jeffrey]. Her report and other documents presented by [Jeffrey] show [J.S.'s] emotional development will be significantly impaired by continued contact with [Jeffrey].

Appellant's App. p. 71-72. As a result, the trial court suspended all contact between Jeffrey and J.S.

After receiving a certificate for completing training in positive parenting methods in 2003, and participating in three sessions of counseling with a psychologist in 2005, Jeffrey filed a petition to modify custody, in 2006, claiming that he could better care for J.S. The trial court denied Jeffrey's petition. Jeffrey sought permission to bring this belated appeal that was granted by the trial court. This appeal now ensues.

### **Discussion and Decision**

We note at the outset that the appellee has failed to file a brief in this appeal. "When the appellee has failed to submit an answer brief we need not undertake the burden of developing an argument on the appellee's behalf. Rather, we will reverse the trial court's judgment if the appellant's brief presents a case of prima facie error." *Trinity Homes, LLC v. Fang*, 848 N.E.2d 1065, 1068 (Ind. 2006). "Prima facie error in this context is defined as, 'at first sight, on first appearance, or on the face of it.'" *Id.* (citing *Santana v. Santana*, 708 N.E.2d 886, 887 (Ind. Ct. App. 1999)). "Where an appellant is unable to meet this burden, we will affirm." *Id.*

Jeffrey argues that the trial court abused its discretion in denying his petition for custody.<sup>2</sup> In general, we review custody modifications for an abuse of discretion, with a “preference for granting latitude and deference to our trial judges in family law matters.” *Kirk v. Kirk*, 770 N.E.2d 304, 307 (Ind. 2002). When reviewing a trial court’s determination on a petition to modify custody, we may not reweigh the evidence or judge the credibility of the witnesses. *Green v. Green*, 843 N.E.2d 23, 26 (Ind. Ct. App. 2006). Rather, we consider only the evidence most favorable to the judgment and any reasonable inferences from that evidence. *Id.*

In the initial custody determination, both parents are presumed equally entitled to custody, but a petitioner seeking subsequent modification bears the burden of demonstrating that the existing custody arrangement should be altered. *Id.* at 27. A court may not modify a child custody order unless (1) the modification is in the best interests of the child and (2) there is a substantial change in one or more of the factors a court may consider under Indiana Code § 31-17-2-8 when it originally determines custody. *See* Ind. Code § 31-17-2-21. Section 8 provides:

The court shall determine custody and enter a custody order in accordance with the best interests of the child. In determining the best interests of the child, there is no presumption favoring either parent. The court shall consider all relevant factors, including the following:

- (1) The age and sex of the child.
- (2) The wishes of the child’s parent or parents.

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<sup>2</sup> Jeffrey also suggests that the trial court’s decision in 2002 giving sole custody of J.S. to Jessica and denying him the right of visitation had the effect of terminating his parental rights without affording him due process of law. Because Jeffrey has failed to cite to any authority supporting this argument and has not set forth any cogent argument explaining how his due process rights were violated, he has waived this claim. *See* Ind. Appellate Rule 46(A)(8)(a).

(3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.

(4) The interaction and interrelationship of the child with:

(A) the child's parent or parents;

(B) the child's sibling; and

(C) any other person who may significantly affect the child's best interests.

(5) The child's adjustment to the child's:

(A) home;

(B) school; and

(C) community.

(6) The mental and physical health of all individuals involved.

(7) Evidence of a pattern of domestic or family violence by either parent.

(8) Evidence that the child has been cared for by a de facto custodian.

Ind. Code § 31-17-2-8.

On appeal, Jeffrey references a parenting class he completed in 2003 and two recent letters from his psychologist indicating that he should be given visitation with J.S. as evidence that a modification of custody is warranted. However, he fails to articulate any argument linking this evidence with a showing that a substantial change occurred in one or more of the eight factors considered by the trial court in determining whether modification is warranted and that modification is in the best interests of J.S. Further, the record is replete with evidence indicating that it is not in J.S.'s best interests, at this time, to have contact with Jeffrey. While we certainly understand Jeffrey's frustration, he

simply has not met his burden of showing that the existing custody arrangement should be modified. We therefore cannot conclude that the trial court abused its discretion in denying Jeffrey's petition to modify custody.

Affirmed.

SULLIVAN, J., and ROBB, J., concur.